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No. 82-756

In the Supreme Court of the United States

OCTOBER TERM, 1982

ESTATE OF CLINTON T. FROCK, ET AL., PETITIONERS

v.

UNITED STATES RAILROAD RETIREMENT BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioners challenge the constitutionality of Section 3(h)(6) of the Railroad Retirement Act of 1974, Pub. L. No. 97-35, Section 1118(e)(3), 95 Stat. 6321, to be codified at 45 U.S.C. 231b(h)(6), which prohibits the payment of so-called "windfall" or "dual" benefits[1] under the Act except where entitlement to those benefits was "determined prior to August 13, 1981," the date on which Section 3(h)(6) was enacted.

1. Before 1974, individuals fully insured under the Railroad Retirement System and the Social Security System were entitled to benefits under both. The Railroad Retirement Act of 1974 established a system for phasing out this practice. See *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166 (1980) (holding that phase out did not

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[1]See *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 169-170 (1980).

violate equal protection). Under that Act, a worker or dependent was eligible for dual benefits only if he or she "would have been entitled" to Social Security benefits "under the provisions of the Social Security Act as in effect on December 31, 1974" (45 U.S.C. 231b(h)(3) and (4)).

Application of this phase-out scheme was made more complicated by this Court's decision in *Califano* v. *Goldfarb*, 430 U.S. 199 (1977), which held that the Fifth Amendment was violated by a provision in the Social Security Act requiring husbands, but not wives, to prove dependency on their insured spouses in order to receive spousal Social Security benefits. Following *Goldfarb*, the Railroad Retirement Board was required to decide whether railroad retirees were entitled to dual benefits if they were not entitled to Social Security benefits under the law as interpreted as of December 31, 1974, but were entitled to such benefits under *Goldfarb*. The Board concluded that such individuals were not entitled to dual benefits, but in *Gebbie* v. *United States Railroad Retirement Board*, 631 F.2d 512 (7th Cir. 1980), the Seventh Circuit reached the opposite conclusion as a matter of statutory construction (see *id.* at 516). However, the *Gebbie* court refused to certify that case as a class action (*id.* at 516 n.9), and therefore its decision was binding only with respect to the three retirees who initiated that action. The Board did not acquiesce in *Gebbie's* interpretation of the statute.

In response to *Gebbie*, "which threatened to impose significant financial burdens upon the railroad retirement system" (Pet. App. 22-A), Congress enacted Section 3(h)(6), which provides that an individual may not receive dual benefits "unless the entitlement of such individual to such amount had been determined prior to August 13, 1981."[2]

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[2]Congress also addressed the *Gebbie* issue by adding Sections 4(e)(5) and 4(h)(2) of the Act, 45 U.S.C. 231c(e)(5)) and 231c(h)(2), which phase out windfall dual benefits for spouses, widows, and widowers in a

2. Petitioner Stribling and Clinton T. Frock, whose estate has petitioned here, are individuals who would have been entitled to dual benefits under *Gebbie* but whose entitlement to such benefits had not been determined by the Board or any court prior to August 13, 1981. The Board denied their requests for dual benefits, and the court of appeals affirmed, concluding the Section 3(h)(6) barred such payments and is constitutional.[3] The court first rejected petitioners' claim that *Gebbie* had "determined" their entitlement to benefits (Pet. App. 14-A to 19-A). The court noted that Section 3(h)(6) specifically requires an individual determination of entitlement (Pet. App. 15-A) and that *Gebbie* was not a class action (*id.* at 16-A).

Turning to petitioners' constitutional claims, the court found no merit in the argument that Section 3(h)(6) violates due process by conditioning "their right to benefits upon when the Board or a court acts affirmatively upon their

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similar manner to Section 3(h)(6). See H.R. Rep. No. 97-208, 97th Cong., 1st Sess. 862-865 (1981).

[3]In 1968, Clinton Frock began to receive an annuity under the Railroad Retirement Act of 1937. On January 1, 1975, the Railroad Retirement Act of 1937, 45 U.S.C. (1970 ed.) 228a *et seq.*, was replaced by the Railroad Retirement Act of 1974, 45 U.S.C. (& Supp. IV) 231 *et seq.*, and Frock's annuity was converted into an annuity under that statute. Following *Califano* v. *Goldfarb*, *supra*, the Board determined that Frock was not entitled to dual benefits under the provisions of the 1974 Act, and Frock did not seek administrative or judicial review of that determination at that time.

On February 27, 1981, Frock requested a benefit under Section 3(h)(3) in light of the Seventh Circuit's decision in *Gebbie*, which had been handed down nearly four months earlier (Pet. App. 14A). The Board declined to acquiesce in *Gebbie*, and therefore this request was denied (Pet. App. 14A). Frock then filed a petition for review in the Seventh Circuit. He died on August 28, 1982.

Charles Stribling, like Frock, was denied dual benefits. After exhausting administrative remedies, he petitioned for review by the Seventh Circuit.

request for benefits, rather than upon when they became eligible for benefits" (Pet. App. 20A-21A). Stating that the proper test is whether the statute "manifests a patently arbitrary classification, utterly lacking in rational justification" (Pet. App. 21-A, quoting *Califano* v. *Goldfarb, supra*, 430 U.S. at 210, quoting *Fleming* v. *Nestor*, 363 U.S. 603, 611 (1960)), the court observed (Pet. App. 22-A) that "[t]he decision not to revoke the benefits of those who had been determined to be eligible for them was a rational means of recognizing expectations created by court decisions and Board actions," while at the same time protecting the financial stability of the Railroad Retirement System.

Finally, the court held (Pet. App. 24-A) that Section 3(h)(6) does not violate equal protection. Conducting the "twofold inquiry" employed in *Personnel Administrator* v. *Feeney*, 442 U.S. 256 (1979), the court first determined (Pet. App. 27-A to 29-A) that the classification contained in Section 3(h)(6) is "neutral in the sense that it is not gender based" (442 U.S. at 274). The court then concluded (Pet. App. 30-A to 32-A) that even if that neutral classification worked to the disadvantage of one gender, it did not "reflect[] invidious gender-based discrimination" (442 U.S. at 274). "[T]he legislative history is clear that Congress passed Section 3(h)(6), not in an attempt to discriminate against anyone on the basis of sex, but rather in an attempt to forestall bankruptcy of the railroad retirement system by eliminating dual benefits for both men and women" (Pet. App. 31-A).

3. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Moreover, the decision below will not cause undue hardship or deprive anyone of benefits currently being received; instead, it merely prevents certain individuals from obtaining future "dual" or "windfall" benefits. Finally, the decision is of minimal continuing

importance, because Section 3(h)(6) plainly forecloses the payment of dual benefits to persons who did not even apply for them prior to August 13, 1981. Accordingly, further review by this Court is not warranted.

a. Petitioners contend (Pet. 15-26) that the decision below conflicts with *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), but there is little similarity between *Logan* and the present case. In *Logan*, an employee allegedly discharged because of a physical handicap unrelated to ability filed a timely complaint of discrimination with the Illinois Fair Employment Practices Commission, as he was required to do by state law, but the Commission failed to convene a factfinding conference within the period prescribed by statute. The Supreme Court of Illinois held that the Commission was accordingly deprived of jurisdiction to adjudicate the complaint and that the former employee was unable to obtain administrative or judicial review of his discrimination complaint. The court rejected the former employee's claim that his due process rights would be violated if the Commission's error were permitted in effect to extinguish his cause of action. This Court reversed, holding that the right to use the Commission's adjudicatory procedures was a species of property protected by the Due Process Clause and that the former employee had been denied an opportunity for an appropriate hearing on the merits of his complaint " 'at a meaningful time and in a meaningful manner' " (455 U.S. at 437, quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)).

The critical difference between *Logan* and the present case is manifest. In *Logan*, an individual's cause of action was extinguished for no valid reason but simply because the state authorities had erred. Here, by contrast, Congress proceeded rationally when it decided to phase out dual benefits and chose a date by which all claims to such benefits would have to be determined. The cut-off date chosen by

Congress undoubtedly produced unfortunate results for those persons who did not become eligible for dual benefits until shortly before the cut-off and thus were unable to prosecute their claims to a successful conclusion in time. The same result would occur, however, no matter what date Congress chose.[4]

Petitioners do not dispute that "railroad benefits, like social security benefits, are not contractual and may be altered or even eliminated at any time." *United States Railroad Retirement Board* v. *Fritz, supra,* 449 U.S. at 174. See *Logan* v. *Zimmerman Brush Co., supra,* 455 U.S. at 432-433. Instead, they suggest (Pet. 15) that, rather than denying benefits to those whose entitlement was not determined by a certain date, Congress should either have "eliminated dual benefits altogether" or "limited them to individuals already receiving them." But Congress surely did not act unconstitutionally in concluding that both of those options would have produced results at least as harsh as those under the plan it chose. Eliminating dual benefits altogether would have worked a hardship upon those who were already receiving such benefits and had come to depend upon them. Limiting dual benefits to those receiving them as of a particular date would have produced unfortunate results for persons who otherwise would have begun receiving benefits shortly after the cut off. Similarly, if Congress had provided for the denial of benefits to anyone who had not *become eligible* by a certain date (rather than anyone not *determined to be eligible*), there would have been unpleasant consequences for those who became eligible not long after

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[4]Here, unlike in *Logan*, "there is no procedure which the petitioners claim was denied them. Rather, the petitioners object that a procedure was required before benefits would vest" (Pet. App. 23-A). Moreover, "petitioners do not claim that the Board deliberately delayed action on their applications in anticipation of the passage of Section 3(h)(6)." Pet. App. 23-A n.13.

the critical date. In short, closing the ranks of persons eligible to receive benefits usually means that certain individuals, through no fault of their own, will just miss the cut off. It does not follow, however, that those persons are denied due process. If that were the case, closing the category of persons participating in any benefit program would become extermely difficult, if not impossible.[5]

b. Petitioners also claim (Pet. 26-34) that Section 3(h)(6) violates the equal protection component of the Fifth Amendment in that it creates a gender-based classification. This argument lacks merit. Certainly Section 3(h)(6) does not contain any express gender-based classification. It simply establishes a cut-off date for determining entitlement to dual benefits, and that date is equally applicable to men and women. Because Section 3(h)(6) does not contain any express gender-based classification, the court below correctly turned to the analysis employed in *Personnel Administrator* v. *Feeney, supra.* Under that analysis, "[t]he first question is whether the statut[e] * * * is indeed neutral in the sense that it is not gender-based" (442 U.S. at 274). If there is no gender-based classification, whether "covert or overt," the next question is whether any adverse effect upon one gender or the other is the product of "purposeful discrimination" (*ibid.*).

Here, the court of appeals correctly concluded (Pet. App. 27-A to 30-A) that Section 3(h)(6) does not contain a covert gender-based classification. As the court below noted (Pet. App. 29-A to 30-A):

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[5]Petitioners argued below and suggest here (see Pet. 17-21) that their entitlement to dual benefits was conclusively established in *Gebbie* and that the Board was bound to follow *Gebbie* in all future cases. However, the *Gebbie* court pointedly refused to certify that case as a class action (see 631 F.2d at 516 n.9), thus emphasizing that it was binding only with respect to the individual litigants. See also Pet. App. 18-A to 19-A.

> [S]ection 3(h)(6) cannot rationally be explained as an effort to discriminate on the basis of gender. The class of persons excluded from dual benefits under this section will be composed of men and women. Similarly, the class of persons who will receive benefits will be composed of men and women.

In addition, the court of appeals correctly held that Section 3(h)(6) was not enacted for an invidious gender-based purpose. Rather, the legislative history shows that the statute was passed to protect the financial stability of the Railroad Retirement Fund[6] without eliminating dual benefits of persons who had come to rely upon those benefits either because they were already receiving them or because their right to receive them had been determined. See *United States Railroad Retirement Board* v. *Fritz*, *supra*, 449 U.S. at 169 n.2; S. Rep. No. 93-1163, 93d Cong., 2d Sess. 4 (1974).

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[6]Petitioners contend (Pet. 20-21) that fiscal concerns were not relevant in enacting Section 3(h)(6). They point to Section 15(d) of the Act, 45 U.S.C. 231n(d), which allows Congress to put a cap on dual payments by limiting the amount payable in any fiscal year to the amount appropriated. Under Section 7(c)(1) of the Act, 45 U.S.C. 231f(c)(1), in any fiscal year in which the amount of the appropriations does not equal the amount that must be paid out under the dual benefit sections of the Railroad Retirement Act, the Board must proportionately reduce the dual benefits payable in that year. For fiscal year 1982, for example, windfalls were paid at 88% of the full amount. Petitioners fail to appreciate that the greater the number of beneficiaries of windfalls, the more likely is the possibility that the amount of dual payments per beneficiary will have to be reduced. In enacting Section 3(h)(6) and its companion sections, Congress was phasing out dual benefits for certain groups of individuals, *i.e.*, (1) employees receiving windfalls based upon their spouse's earnings; (2) spouses of employees; and (3) widows or widowers of employees. By this action, Congress helped to ensure that the individuals still entitled to dual benefits would receive full payment. Moreover, by limiting the class of persons entitled to windfall benefits, Congress increased the likelihood that the appropriations for such benefits would not always be exhausted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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